Fraser Trebilcock LAWYERS

Memorandum

TO: House Appropriations - Environmental Quality Subcommittee
Rep. Rebekah Warren
Rep. Doug Bennett
Rep. John Espinoza
Rep. Bill Rogers

CC: Lewis N. Dodak
William G. Milliken

FROM: Geoffrey D. Harrison

RE: House Bill No. 4542

DATE: March 17, 2009

EXECUTIVE SUMMARY

1. Gov. Granholm has proposed that Michigan abandon its wetland regulation and enforcement program and relinquish the entire matter to the federal government.

   A. based on the common fallacy that Michigan's program (administered by the MDEQ) issues the same permits based on the same criteria as the federal wetlands permitting program

   B. federal program is conducted under Section 404 of the Clean Water Act, 33 USC 1344, without reference to Michigan law

2. The problem with federal wetland jurisdiction

   A. federal jurisdiction is narrowly defined in the CWA to only those wetlands that abut "navigable waters"

   B. *Rapanos v United States*, No. 04-1034 (U.S. 6/19/2006) (2006): Congress intended that the CWA confer jurisdiction only over permanent watercourses

      1. federal wetland jurisdiction does not extend to "isolated" wetlands

      2. can not establish jurisdiction by mere hydrologic connection

3. only those wetlands with a continuous surface connection to bodies that are covered by the CWA

C. There are wetlands that are exempt from federal jurisdiction

1. impacts to these "isolated" wetlands are currently regulated solely by the MDEQ under Part 303

2. Bill would leave these unregulated by any governmental agency and thus open to impairment and destruction with impunity.

D. Expansion of federal wetland authority would deprive Michigan citizens of of a meaningful opportunity to contest the denial of a proposed wetland use

1. Appeal of MDEQ decisions is accomplished via contested case under Part 303

a. *de novo* review by independent hearing administrative law judge

b. witness testimony

c. cross examination

d. expert investigation of ecological issues

2. Federal has no such formal requirement

a. the record is reviewed by another agency employee

b. no witness (expert or otherwise) testimony is received

c. far less protection to a landowner

d. Michigan has historically allowed such persons a much greater opportunity to check agency decision-making

3. The problem with local wetland regulation

A. MCL 324.30308

1. requires the creation of a complete wetland inventory map prior to the enactment of a local wetland ordinance

2. mandates the notification of every property owner as to the existence of the maps and any subsequent amendment thereof

3. requires public review of the wetland maps

4. requires notice to every affected landowner

5. mandates an opportunity for an appeal of any adverse decision in the same manner as that currently provided by the MDEQ

6. allows for property tax re-assessment if permit denied

7. subjects local government to a potential takings claim - MCL 324. 30323(3)

B. Result is no effective local regulation

C. Bill fails to provide a consistent definition of "wetland" beyond October 1, 2010

1. no reasonable guidance to current and potential landowners

2. crazy quilt of local regulation

3. substantially impair and prevent the consistent development and use of property due only to the happenstance of geography

4. The Bill favors the expansion of the MDEQ's wetland jurisdiction

A. MCL 324.30301(N) defines wetland as: "land characterized by the presence of water...and that under normal circumstances does support wetland vegetation and aquatic life and is commonly referred to as a bog, swamp, or marsh...."

B. Bill removes the "and" prior to "is commonly referred to as a bog, swamp or marsh."

C. Potentially expands MDEQ authority beyond the current definition of "wetland" in the Part 303

5. While the Bill's stated objective is to reduce expenditures by our state government, it imposes other costs that are much to high to bear

A. would leave thousands of acres of wetlands without protection

B. the only proposed cure for bridging the gap in state/federal jurisdiction is the expenditure of substantial funds (for which no mechanism is proposed) to cover the regulation and enforcement costs passed down to local governments

C. Bill would create major problems for landowners associated with navigating through a scheme of complex, inconsistent and poorly administered local ordinances

D. The Bill allows for the potential expansion of wetland regulation by the MDEQ beyond that which was contemplated upon the enactment of Part 303 and the creation of the MDEQ itself

E. The Bill is poorly thought out and represents a knee-jerk reaction to offer support for a pronouncement made by the governor with little aforethought

F. Because of the problems it creates, no effective cost savings would be realized by the enactment of the Bill

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House Bill No. 4542 ("the Bill") seeks, among other things, to revise and amend the current language of MCL 324.30301, *et. seq.* This statute is also known as Part 303 of the Natural Resources and Environmental Protection Act (NREPA) or simply as "Part 303." In so doing, it purports to provide a fix to a statute that is not broken.

Much of the impetus behind the Bill can be traced to a brief mention in Gov. Granholm's recent "State of the State" address, wherein she promoted the cost savings that would be realized if Michigan were to abandon its wetland program and relinquish the entire matter to the federal government. This aim is based on the common fallacy that Michigan wetlands permitting program (currently administered by the Michigan Department of Environmental Quality or "MDEQ") is a mere duplication of the federal wetlands permitting project under Section 404 of the Clean Water Act, 33 USC 1344. This is simply not the case. While the full comparison of the two programs is well beyond the scope of this memorandum, there are several important

factors to consider in assessing the merits (or the lack thereof) of the objectives that would be served by the enactment of the Bill.

The first portion of the Bill would amend the statute and strike out all references to the state administered wetlands permit program under Part 303. Indeed, the proposed version of MCL 324.30303(1) – (3) would prohibit the MDEQ from regulating activities in a wetland or participating in any program under section 404 of the Clean Water Act (CWA). This would end all state regulatory and enforcement obligations in wetlands in the State of Michigan and would further prohibit the Department from entering into a contract with the federal government to do so on its behalf.

Thus it would appear that the Bill does indeed propose to surrender control of Michigan's wetlands to the federal government, as proposed by our governor. For reasons that I will more fully explain below this would have serious ramifications to people and natural resources of the State of Michigan. Aside from that stated objective, the Bill has other features which are not only inconsistent with this purpose, but which reveal a completely different agenda. *To-wit*: the Bill is rife with curious amendments to statutory language that would inure to the benefit of the MDEQ's subsequent administration of the wetlands program under Part 303. Moreover, the Bill contains enhanced language that provide a not too subtle desire to transfer the regulation of wetlands to local governments. It is unlikely that these are coincidental and therefore lead to the conclusion that the MDEQ not only seeks to retain jurisdiction over wetlands, but is actively seeking a legislative mandate to expand its authority over the same. This too will be addressed in detail in subsequent sections of this memorandum.

The problem with federal wetland jurisdiction. It is true that Michigan is one of only two states in the country that independently regulate wetlands on a state-wide level.[1] This should come as no surprise in light of the fact that Michigan is uniquely positioned as two peninsulas intersection the largest freshwater lake system in the world. That is not to say that the permits issued by the MDEQ pursuant to Part 303 are merely reiterations of the companion federal permits issued in every instance in which a wetland is impacted through human interaction and development of property. In fact, it could be said that the opposite is true. Under the working arrangement between the MDEQ and the United States Environmental Protection Agency (EPA)[2], for example, the determination with regard to the issuance of a federal permit is deferred until an MDEQ permit is obtained for the project. Moreover, federal jurisdiction over wetlands is narrowly defined with in the CWA to only those wetlands that abut "navigable waters."[3]

As noted by the United States Supreme Court in its now infamous decision in *Rapanos v United States*, No. 04-1034 (U.S. 6/19/2006) (2006), the purposeful inclusion of limited terminology such as "navigable waters" in the CWA reveals Congress' intention that it confers jurisdiction only over permanent watercourses. Moreover, *Rapanos* also clearly stated for the first time that federal wetland jurisdiction does not extend to inland (or "isolated") wetlands that are now immediately adjacent to navigable watercourses. In so doing, the *Rapanos* opinion offers the following summary:

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[1] New Jersey is the other.
[2] The EPA administers the Clean Water Act through the United States Army Crops of Engineers (USACE).
[3] These are often referred to as "section 10 waters" in reference to section 10 of the CWA, which actually uses the term "waters of the United States." For purposes of this discussion, however, the terms are synonymous.

> A wetland may not be considered "adjacent to" remote "waters of the United States" based on a mere hydrologic connection. *Riverside Bayview*[4] rested on an inherent ambiguity in defining where the "water" ends and its abutting ("adjacent") wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds are not "waters of the United States" in their own right, see *SWANCC*[5], *supra,* at 167, 171, and present no boundary-drawing problem justifying the invocation of such ecological factors. Thus, only those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between the two, are "adjacent" to such waters and covered by the Act....Pp. 21-24.

In reality then, under the clear language of the Clean Water Act and the guidance supplied by *Rapanos*, there are wetlands that are exempt from federal jurisdiction under the CWA (or any other statute). Specifically, there is no federal jurisdiction over wetlands that abut inland lakes, streams or ponds that do not enjoy a surface water connection to one of the Great Lakes, or a major ("navigable") river within the State of Michigan. As a result, the impacts to these "isolated" wetlands are currently regulated solely by the MDEQ under Part 303. If, however, Part 303 was amended in the proposed fashion, these wetlands would be unregulated by any governmental agency and thus open to impairment and destruction with impunity.

Any expansion of federal wetland authority (either by regulatory amendment or simply for want of a check on the agency) would also deprive the citizens of Michigan of a meaningful opportunity to contest the denial of a proposed wetland use of their property. Under Part 303, all MDEQ permit decisions are subject to an administrative appeal pursuant (or "contested case"), whereby an independent administrative law judge is required to complete a *de novo* review of the situation to determine whether the MDEQ's decision was rendered in accordance with Part 303.

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[4] *United States v Riverside Bayview Homes, Inc*, 474 US 121, 106 SCt 455, 88 LEd2d 419 (1985).

[5] Solid Waste Agency of Northern Cook County v United States Army Corps of Engineers et al, 531 US 159 (2001).

This entails the presentation and cross-examination of witnesses, the review of all of the available evidence, the introduction of expert testimony and the application of recognized precedent. The record derived from these proceedings is then transmitted to the Director of the MDEQ who renders a Final Determination and Order representing the agency's final decision in the case.

No such proceedings are entertained under the federal scheme. Instead, the record is examined by another agency employee. Although briefs are submitted by the applicant and the U. S. Attorney's Office, no witness (expert or otherwise) testimony is received and a decision is made without any oral argument.

Clearly, the federal scheme provides far less protection to a landowner who is aggrieved of an adverse decision made by an employee of a government agency that has far-reaching considerations as to the use, value and enjoyment of his or her property. Michigan has historically allowed such persons a much greater opportunity to demonstrate that a proposed use of private property will be conducted in harmony with the requirements of Part 303 and to prevent the improper restriction on the use of their land by an agency acting beyond its statutory authority. This is clearly not the case under the federal regulations and this opportunity will be effectively erased under the Bill.

The problem with local wetland regulation. Perhaps in recognition of the above, the Bill also seeks to instill the authority previously granted to the MDEQ to local units of government. On balance, it should be noted that Part 303 has contained a provision that allows local regulation of wetlands since its inception. These provisions were, however, not only preserved in the Bill, but are actually imbued with greater emphasis in the amended language. For

example, the amended version of MCL 324.30305(1) contains a new directive specifically instructing a local government as to the laundry list of activities that shall be allowed in a wetland without the benefit of a permit under its ordinance. Thus, it would appear that the Bill seeks to allay the obvious concerns noted above by merely shifting the responsibility to local governments. This appearance is something of an illusion in light of the preservation of MCL 324.30308(1) in the Bill, which reads:

> Prior to the effective date of an ordinance authorized under section 30307, a local unit of government what wishes to adopt such an ordinance shall complete and make available to the public art a reasonable cost an inventory of all wetland within the local unit of government...A local unit of government shall make a draft of the inventory map available to the public, shall provide for public notice and comment opportunity prior to finalizing the inventory map, and shall respond in writing to written comments received by the local unit of government regarding the contents of the inventory.

This section also requires that the local unit provide notification to every property owner as to the existence of the maps (and any subsequent amendment thereof), the physical location at which the maps may be reviewed and that his or her property may be regulated as a wetland under the ordinance.[6] This would create the need for any local unit of government seeking to comply with the requirements of Part 303 to hire and retain qualified staff devoted solely to inventorying the wetlands within its boundaries, regulating the use thereof and enforcing any violations of the local ordinance. All of these functions (save for the inventory) are now performed by the MDEQ.

Subsequent sections of the Bill require any local authority to provide an opportunity for an appeal of its determination in the same manner as that currently provided by the MDEQ in the

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[6] Curiously, Part 303 places no such notification requirements on the MDEQ. Likewise, the MDEQ is not required to compile, create or publish wetland inventory maps. Rather, the creation and maintenance of a wetland inventory is entirely voluntary.

State Office of Administrative Hearings and Rules. This would entail the appointment (or election) of local administrative law judges, require local government attorneys to obtain expertise in wetlands regulation and commit local facilities and resources to providing the appeal procedures required by the Bill.[7]

In addition, the Bill continues the current requirement that any local ordinance shall also include a provision that allows for a landowner to request and obtain "a revaluation of the affected property for assessment purposes to determine its fair market value under the use restriction if a permit is denied by a local unit of government for a proposed wetland use." It should be noted that there is no companion provision subjecting the MDEQ to a similar potential loss of revenue. Likewise, the Bill also continues to subject the local government to a takings claim under which it could be liable to the affected landowner or the full amount of lost value or be forced to purchase the property for its pre-regulation value. MCL 324. 30323(3). Under the Bill, the MDEQ would not be subject to the same considerations as it would be out of the wetlands regulation scheme altogether.

This quite literally begs the questions as to where local governments are going to find the qualified personnel, office space equipment and, most importantly the funding to complete the initial inventory, create the map, notify the landowners, meaningfully evaluate permit applications, successfully support its decisions in an administrative appeal or court proceeding, and enforce violations of its ordinance, while at the same time facing the prospect of declining property tax revenues for each adverse decision it makes. In the current statute, these factors were inserted primarily to deter local enforcement of Part 303, which the MDEQ saw as its sole

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[7] Likewise, the Bill also exposes local appeal decisions to judicial review.

responsibility. The current Bill, however creates unfunded mandates to bridge the gap created by deferring all wetland regulation to the federal government.

In addition, the Bill does not promote the use of any consistent definition of "wetland" beyond October 1, 2010. This clearly promotes a myriad of local definitions that would have no consistency and would provide no reasonable guidance to current and potential landowners as to the character of their property and its fitness for development, in contrast with the current scheme under which a consistent definition of "wetland" is applied in every circumstance. In effect and practice, the localization of wetland regulation would expose all landowners to a crazy quilt of local regulation that would substantially impair and indeed even prevent the consistent development and use of property due only to the happenstance of geography.

The Bill favors the expansion of the MDEQ's wetland jurisdiction. It is quite apparent, of course, that the Bill's promotion of an agenda favoring the MDEQ's interpretation of certain elements of Part 303 would only be effective in the event that portions depriving it of control over the wetlands program were to be stricken. The most glaring of these is the proposed revision to MCL 324.30301, the definitional section of Part 303. New sub-paragraph (N) however, seeks to shore up what has been revealed to be a loophole in the definition of a regulated wetland. Some attorneys (me, for instance) have long awaited the opportunity to challenge the scope of the MDEQ's wetland jurisdiction in certain circumstances. One of the definitional requirements of the current law is that a wetland must have certain features in order to come within the purview of the MDEQ's permitting requirements. Specifically, it must be "land characterized by the presence of water...and that under normal circumstances does support wetland vegetation and aquatic life and is commonly referred to as a bog, swamp, or marsh...."

The Bill would drastically broaden the definition of a wetland subject to MDEQ regulation by removing the "and" prior to "is commonly referred to as a bog, swamp or marsh." In other words, the MDEQ would seek to regulate wetlands that do not fit the current definition of "wetland" under the Part 303.

Conclusion. As noted herein, while the Bill's stated objective is to reduce expenditures by our state government, it creates costs that are much to high to bear. First and foremost, the Bill would leave thousands of acres of a valuable natural resource (namely wetlands) without protection from impairment and destruction. This obvious impropriety could only be cured by the expenditure of substantial funds (for which no mechanism is proposed) to cover the regulation and enforcement costs passed down to local governments. In addition, the Bill imposes very real costs to Michigan property owners and developers in navigating through a scheme of complex, inconsistent and poorly administered local ordinances.

Aside from the above, the Bill also allows for the potential expansion of wetland regulation by the MDEQ beyond that which was contemplated upon the enactment of Part 303 and the creation of the MDEQ itself in the early 1993. The Bill itself is poorly thought out and represents a knee-jerk reaction to offer support for a pronouncement made by the governor with little aforethought. As noted herein, the Bill would create an extremely problematic situation in which no effective cost savings would be realized.

West Michigan Environmental Action Council

JOINT HOUSE COMMITTEE MEETING
GREAT LAKES AND ENVIRONMENT, Rep. Rebekah Warren, Chair
ENVIRONMENTAL QUALITY OF THE STANDING COMMITTEE ON APPROPRIATIONS, Rep. Doug Bennett, Chair

March 17, 2009

West Michigan Environmental Action Council, a non-profit organization dedicated to protecting Michigan's water for over 40 years, issues the following statement in opposition to the proposed discontinuation of Michigan's Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act.

Wetlands are essential for the health of our natural resources in Michigan, such as groundwater, inland lakes, fisheries, wildlife and the Great Lakes. Already, over half of Michigan's original wetlands have been drained or filled. The loss of the existing wetlands program in Michigan will result in the loss of protection for nearly 1 million acres of isolated wetlands that do not fall under federal jurisdiction.

Wetlands in Michigan provide ecological services to the residents of Michigan by functioning to provide flood control, sediment retention, groundwater recharge, nutrient retention, habitat and nursery grounds for plants and animals, micro-climate stabilization, and carbon sequestration. These services provided by our wetlands have been the focus of several studies aimed at quantifying their economic value. Values for freshwater wetlands are estimated to range from $1,214[1] to $10,573[2] per acre annually, depending on the size and type of ecological services provided by each wetland. The savings of $2.1 million to the State of Michigan that would be offset by repealing Michigan's wetland program is minuscule compared to the billions of dollars in ecological services that wetlands provide to the state.

Wetlands have been compared to "nature's kidneys, filtering pollutants and sediments from surface water." If one's kidneys fail, there is medical technology available to filter the impurities from human blood via dialysis. But nobody in their right mind would sell their kidneys and rely on an inefficient and expensive technology to perform such a critical function. Likewise, the cost of replacing the ecological function of wetlands with technology would be an expensive and inefficient alternative; this is the reality that Michigan faces if the wetlands program is repealed.

At a time when water scarcity is prevalent throughout the world, Michigan is seated at the center of guardianship for twenty percent of the world's fresh surface water. We have recently been mandated by the Great Lakes Compact to implement water conservation programs; our President is proposing a half-billion dollars in his budget plan for the Great Lake states to step up and partner to improve water quality; and Michigan is considering selling off control of arguably the single-most effective way to improve water quality for $2 million. The proposed change to Michigan's wetlands regulation is a counter-productive proposition, and will prove to be more costly than the budgetary issue it is intended solve.

We strongly urge you to consider any and all alternatives to this decision.

Kristi D. Klomp, Water Quality Programs Manager

[1] Brander, L.M., R.J.G.M. Florax, and J.E. Veraat. 2006 The Empirics of Wetland Valuation: A Comprehensive Summary and Meta-Analysis of the Literature. Environmental and Resource Economics. Vol 33:2. p223-250.

[2] Whitehead, J.C., P.A. Groothuis, R. Southwick, P. Foster-Turley. 2006. Economic Values of Saginaw Bay Coastal Marshes With a Focus on Recreational Values. A report by Southwick Associates, Inc., funded by Ducks Unlimited, Inc., NFWF, USEPA, and MDEQ. 65 pp.

1007 Lake Drive, SE - Grand Rapids, Michigan 49506 - (616) 451-3051